

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of)	MM Docket No. 93-75
TRINITY BROADCASTING OF FLORIDA,)	
INC.)	BRCT-911001LY
)	
For Renewal of License of)	
Television Station WHFT(TV))	
Miami, Florida)	
)	
GLENDAL E BROADCASTING COMPANY)	BPCT-911227KE
)	
For Construction Permit)	
Miami, Florida)	

To: Hon. Joseph Chachkin
Administrative Law Judge

**MOTION TO DISMISS APPLICATION
OF GLENDAL E BROADCASTING COMPANY**

Trinity Broadcasting of Florida, Inc. ("TBF"), by its counsel, hereby moves to dismiss the application of Glendale Broadcasting Company ("Glendale") as ungrantable for lack of an available transmitter site. In support hereof, TBF respectfully states as follows:

1. The transmitter site proposed by Glendale in its application is the so-called "Candleabra" tower in Pembroke Park, Florida, owned by Tak Broadcasting Corporation ("Tak"). See, Glendale Application, Section VII, Question 2, and Engineering Exhibit EE, p. 2 (Attachment 1 hereto). Appended as Attachment 2 hereto is the affidavit of Tak's Tower Manager and Chief Engineer, James L. Sorensen. The affidavit and its

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attachments make clear that Glendale has lacked assurance of site availability at least since January 31, 1992, when Tak's written offer of a commitment to Glendale expired. Indeed, the evidence shows that Glendale has never had reasonable assurance of site availability. The pertinent facts are as follows.

2. On December 9, 1991, shortly before Glendale filed its application, Mr. Sorensen of Tak sent a certified letter to Glendale's agent, Gregory Daly of Telsa, Inc. The letter, which was captioned "Letter of Intent to Negotiate an Agreement," stated --

"BY THIS LETTER, TAK Broadcasting Corporation ("TBC") extends to your client, Glendale Broadcasting Corporation ("Glendale"), an offer to negotiate a new lease for the tower space now held by WHFT-TV on our tower"

if Glendale should obtain the FCC construction permit or license for the facilities of WHFT(TV) (emphasis added). Although the letter specified certain other requirements that would need to be met, it emphasized that "[t]his is an offer to negotiate a final agreement at a future date." And in a key provision, it explicitly asserted:

"This offer will expire at midnight 31 Jan 1992 without notice and will become null and void thereafter."

A signature line for Glendale was provided at the end of the letter below the words "ACCEPTED: For Glendale Broadcasting Corporation."

3. As attested by Mr. Sorensen, neither Glendale nor any agent or representative of Glendale delivered to Tak an executed acceptance of the offer. Thus, as Mr. Sorensen now confirms,

the incumbent station under challenge by Glendale in this proceeding. Tak's offer letter (in subsection (j)) specified that the only space on the tower available to Glendale was the space now used by WHFT(TV), and provided that the offer "cannot be honored for the purpose of new construction except if the apparatus of WHFT is removed." The letter further stated (at p. 2) that Tak "will terminate its lease with WHFT-TV" if the FCC awards the license to Glendale, and that Tak's leases "automatically terminate as a condition of default when a tenant loses [sic] its FCC license." These statements ostensibly establish that Tak controls the tower space in question and could lease it to Glendale as soon as Glendale replaced WHFT(TV) as the new FCC licensee.

6. However, Tak will not in fact be able to do that. Appended as Attachment 3 hereto is a copy of the current "Tower Space Lease" between Tak and TBF, the incumbent licensee of WHFT(TV).^{1/} Section 10 of the lease specifies that if the Lessee (TBF) loses its FCC license, the lease will not terminate until "the end of a two (2) year period following conclusion of administrative and Court proceedings and appeals." Section 10

offer letter, Glendale would have no access to space on the Candleabra tower for at least two full years after all FCC proceedings and judicial appeals in this case had ended.

7. Under Commission policy, a proposed site is not deemed to be available if the applicant will have no access to the site for such a long time. Thus, in Chicagoland TV Co., 8 RR 2d 758, 760-61 (Rev. Bd. 1966), a site availability issue was designated in September 1966 partly because the proposed site might not become available until 1968. In adding the issue, the Review Board observed that "Chicagoland's argument that it will not need the Kemper Building site until 1968 is premised upon its projection of the duration of this proceeding and fails to take into account any possibility of a disposition thereof prior to 1968." Id. at 761, n. 5. This makes clear that if access to a proposed site will be delayed substantially beyond the grant of FCC authorization, the site is not available.

8. Here, in light of WHFT(TV)'s plain legal right under the lease to remain on the Candleabra tower for two years beyond the end of this proceeding, there is no uncertainty about the matter. Glendale is shut out for at least two years following the final grant of its application. Thus, with no access to its proposed site, it has an ungrantable application.

9. This fundamental defect requires that Glendale's application be dismissed at the outset. The problem cannot be

cured by amendment at this late date, since Glendale could not possibly show the requisite good cause. If Glendale did not know of WHFT(TV)'s two-year holdover right under the tower lease, it should have known. As shown on the face of TBF's Tower Space Lease (in the righthand margin of each page), that document has been on file in the public land records of Broward County since January 11, 1973 (Official Records Book 5123, pp. 1-10). Furthermore, an October 1991 Bankruptcy Court order upholding the Tower Space Lease is also in the Broward County public records (Official Records Book 18870, pp. 756-57), and it identifies exactly where in the public records the lease itself is found.^{2/} Glendale's failure to examine the existing lease in the public records before relying on the statements in Tak's offer letter reflects a pronounced lack of diligence. (Of course, there is no evidence that Glendale did rely on the offer letter, since it never delivered a signed acceptance.)

10. Moreover, even if Glendale could somehow show that its ignorance of the two-year lease provision was excusable, it has no such excuse for having allowed Tak's offer to go unaccepted and thus lapse in January 1992. That matter was completely within Glendale's knowledge and control. Hence, Glendale would have no good cause to try now to cure the lapse either by re-proposing the same site (with an updated site availability showing) or by specifying a different site.

^{2/} See Attachment 4 hereto.

11. The appropriate disposition under these circumstances is outright dismissal of Glendale's application. Montgomery County Media Network, Inc. d/b/a Imagists, FCC 93-196, released April 21, 1993 (Commission dismisses application as ungrantable where applicant had no suitable transmitter site and lacked good cause to amend); Goodlettsville Broadcasting Company, Inc., 5 FCC Rcd 4593, 4594 (1990) ("the ALJ properly dismissed Associates' application after determining that Associates had no viable transmitter site, and that it lacked good cause to amend to specify a new one"); Shoblom Broadcasting, Inc., 95 FCC 2d 444 (Rev. Bd. 1983) (affirming ALJ dismissal of application for lack of viable transmitter site when applicant lacked good cause to amend), rev. denied, FCC 84-119 (1984), aff'd by judgment sub nom. Royce International Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir.), cert. denied, 106 S.Ct. 410 (1985). As these cases demonstrate, an applicant has no right to proceed to hearing when it lacks a transmitter site and is barred from amending.^{3/} Indeed, a hearing would be pointless under the circumstances, since the only possible outcome of a hearing would be denial of the application for the very same reason.

^{3/} The same policy applies when an applicant has not established its financial qualifications and lacks good cause to amend. There too the applicant will be dismissed at the outset. Capitol City Broadcasting Company, 7 FCC Rcd 2629 (1992); Sharron Annette Haley, 6 FCC Rcd 4630 (1991); Carol Sue Bowen, 6 FCC Rcd 10 (Rev. Bd. 1991); Marc A. Albert, 6 FCC Rcd 13 (Rev. Bd. 1991); Edwin A. Bernstein, 4 FCC Rcd 8420 (Rev. Bd. 1989).

11. Accordingly, the Presiding Judge should dismiss Glendale's application at the threshold as ungrantable for lack of an available transmitter site.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA,
INC.

By: Colby M. May
Colby M. May
Joseph E. Dunne, III *h7E*

May & Dunne, Chartered
1000 Thomas Jefferson Street,
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By: Nathaniel F. Emmons
Nathaniel F. Emmons
Howard A. Topel
Christopher A. Holt

Mullin, Rhyne, Emmons and Topel,
P.C.
1000 Connecticut Ave. - Suite 500
Washington, D.C. 20036-5383
(202) 659-4700

May 13, 1993

ATTACHMENT 1

Glendale Application (Excerpts)

Federal Communications Commission
Washington, D. C. 20554

FCC 301

Approved by OMB
3080-0027

Expires 2/28/92

See Page 25 for information
regarding public burden estimate

APPLICATION FOR CONSTRUCTION PERMIT FOR COMMERCIAL BROADCAST STATION

For COMMISSION Fee Use Only

FEE NO:

For APPLICANT Fee Use Only

Is a fee submitted with this
application?

☒ Yes ☐ No

If fee exempt, see 47 CFR Section 1.1102

SECTION VI - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

1 Does the applicant propose to employ five or more full-time employees?

☒ Yes ☐ No

If Yes, the applicant must include an EEO program called for in the separate Broadcast Equal Employment Opportunity Program Report (FCC 906-A).

SECTION VII - CERTIFICATIONS

1 Has or will the applicant comply with the public notice requirement of 47 C.F.R. Section 73.3580?

☒ Yes ☐ No

2 Has the applicant reasonable assurance, in good faith, that the site or structure proposed in Section V of this form, as the location of its transmitting antenna, will be available to the applicant for the applicant's intended purpose?

☒ Yes ☐ No

Exhibit No.

If No, attach as an Exhibit, a full explanation.

3. If reasonable assurance is not based on applicant's ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure.

Name of Person Contacted

James L. Sorensen

Telephone No. (include area code)

305-621-8107

Person contacted: (check one box below)

☐ Owner

☒ Owner's Agent

☐ Other (specify)

The APPLICANT hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with 47 C.F.R. Section 1.65, the APPLICANT has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

II. ENGINEERING DISCUSSION:

A. Proposed Location:

Glendale proposes to locate on the existing tower upon which WHFT currently operates. The tower is located at the SW corner of S. 33rd Avenue & Pembroke Road, Pembroke Park, FL. The City of License, Miami, Florida, is located approximately 26 kilometers on a bearing of N-200-E from this site. Since an existing tower will be used with no change in overall height a Topographic Map showing the proposed site has not been submitted.

The geographic coordinates are:

Latitude: 25° 59' 34"

Longitude: 80° 10' 27"

The regional office of the F.A.A. was not notified of the proposed construction since an existing tower will be used with no change in overall height.

B. Transmitter:

Glendale proposes to install a type accepted TV transmitter. The transmitter will be operated at 60 KW Visual and 6 KW Aural, which is within its rated power.

A calibrated dummy-load and wattmeter will be used in accordance with the transmitter manufacturer's instructions for determining and maintaining power output.

ATTACHMENT 2

Affidavit of James L. Sorensen

AFFIDAVIT

NOW COMES James L. Sorensen, who having been sworn, does depose and say that he is the Tower Manager and Chief Engineer of TAK Broadcasting Corporation, a Delaware Corporation, which is the owner and operator of that specific radio transmission tower located at 3300 Pembroke Road, Pembroke Park, Florida identified as Stainless, Inc. Tower # 2182; FCC/FAA Tower # 1002, and known to the local trade as "Candlebara."

And further, that neither Glendale Broadcasting nor any agent or representative of theirs executed that specific letter of intent to negotiate for Tower Space which I sent to them on or about 09 December 1991. This offering by TBC expired as of 31 January 1992.

And further, that to date, there has been no further contact between Glendale and this office of TBC and that he has no knowledge of any further contact between these two entities for any purpose.

And further, that as evidence whereof he has caused such correspondence as has been had with Glendale his own office and with TBC's other offices regarding this matter.

Further the affiant saith naught.

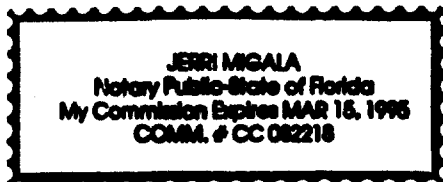
Affiant:

James L. Sorensen

Sworn to and subscribed before me this 26 day of March, 1993
by James L. Sorensen.

Jerry Migala
Jerry Migala
Notary Public, State of Florida

(seal)



TELEFAX

TO: Mr. S. Tak (also T. Nixon, Esq.)

FROM: J. L. Sorensen

REF: WHFT-TV, Channel 45

DATE: 09 DEC 91

Please review the attached letter of intent from this office to Glendale Broadcasters. This is a restatement which I had punched up of their letter of intent, which was a bit lopsided in their favor and not really indicative of the real position they are in.

They are attempting a hostile take-over of Channel 45 on this tower and have asked for surrender terms if they are successful.

We should probably not entertain any offers from Channel 45 at this time for any sort of deal worth less than \$100,000 per year for the tower space.

If Channel 45 loses its license, this will break off yet another third of the Graf-Robertson lease.

I have no feeling on the possibility of the FCC taking the Trinity license away (kind of doubt it) and can only assume that there is a story in here somewhere which might be of interest after the deal is done. This may also signal the possibility of a sale of Channel 45, which means that we need to dispose of the Graf-Robertson matter by some means whether we win in appeals or not.

Letter of Intent to Negotiate an Agreement

09 December 1991

Mr. Gregory B. Daly
TelSA, Inc.
P. O. Box 32223
Washington, D.C. - 20007-0523

CERTIFIED

REF: Glendale Broadcasting Corporation

Dear Mr. Daly:

Thank you for your interest in leasing, or assuming a lease, for tower space at our facility in Miami / Ft. Lauderdale, being that specific steel transmission tower located at 3300 Pembroke Road, Pembroke Park, Florida and also known as Stainless, Inc. Tower Nr. 2182, FAA/FCC tower Nr. 1002 and to the trade as "Candleabra."

We have reviewed your standard letter of intent and prefer to send this letter to you which more accurately spells out our understanding of the requirements of your client and our willingness to try and meet those requirements.

BY THIS LETTER, TAK Broadcasting Corporation ("TBC") extends to your client, Glendale Broadcasting Corporation ("Glendale"), an offer to negotiate a new lease for the tower space now held by WHFT-TV on our tower if:

a) Glendale is a qualified licensee for the operation of the facility in question. Glendale represents that it now holds other similar Licenses, Construction Permits, or other vehicles of authority from the FCC, and that it now holds a valid FCC Construction Permit or Station Operating License for the facilities of WHFT-TV or will do so at the outset of any negotiations which may result from this agreement.

b) Glendale is able to enter into a lease from TBC and to perform to the specifications of such a lease under Florida Law.

TBC will only agree to assign a lease if done as a part of the bulk sale of assets of the selling corporation.

Since the licensing process is governed by action before the FCC to force the current licensee (WHFT-TV) to surrender its license to the FCC and, by separate action, for the FCC to award the said license to your client, if and when that happens, TBC will terminate its lease with WHFT-TV, or any sub-lease under any superceding master lease (as if it were in default) and attempt to negotiate a new lease with Glendale. TBC's leases automatically terminate as a condition of default when a tenant loses its FCC license and TBC will not assign the old lease, but rather will negotiate a new agreement with the successful new licensee.

c) Glendale has the financial ability to perform all the specifications of the lease. (TBC will require a credit report and such other documentation as it deems necessary.)

d) Any proposed changes to the existing apparatus and or any modification to the structure of the tower will be the sole responsibility of Glendale along with any and all engineering reports or studies which TBC may require to support such changes. [The circumstances seem to indicate that this will not be necessary.]

e) Glendale will indemnify, protect, and save harmless from any action for any purpose whatsoever without limitation by any prior licensee, client, or tenant of TBC in which TBC may be involved as the result, direct or indirect, whether or not consequential, of this representation, or any lease or agreement at a future date which might expose TBC to any form of liability whatsoever.

f) Glendale will enter into direct negotiations with TBC for any final lease or agreement. Any commission, charge, or fee which is owing to or paid to TelSA, Inc. shall be paid directly by client and shall be in addition to any charges or fees made by TBC for either facilities or services. TelSA, Inc. agrees that this offer to negotiate is full and complete consideration and compensation for its services to TBC in the past, now, and in the future insofar as TelSA's services to TBC are performed relative to this client.

g) This offer will expire at midnight 31 Jan 1992 without notice and will become null and void thereafter. This is an offer to negotiate a final agreement at a future date and is not an option for space. TBC stipulates that it has not been asked to extend an option for any purpose and that none has been offered by TBC to Glendale for any purpose whatsoever.

h) All offers made by TBC are governed by the most recent

structural report generated by the Engineering Department of Stainless, Inc. and by the most recent Existing Conditions Report and Opinion of the Chief Engineer of TBC. The failure of the apparatus of the tenant to meet these requirements will render this offer and any subsequent offer, option, or agreement from TBC null and void.

i) Estimated annual rental for the space currently occupied by WHFT-TV is \$100,000 with additional ground space for other apparatus at an estimated \$10.00 per square foot. TBC stipulates that it supplies to WHFT-TV no ground space for equipment since WHFT-TV has it's own building on it's own property for this purpose. [The verbally quoted figure of \$50,000 assumed that the TelSA, Inc. client was an FM broadcaster, not a TV operator. The figures of \$50,00 for FM and \$100,000 for TV are at fair market value for the Miami / Ft. Lauderdale / Palm Beach TV ADI. TBC has at this time available space for the installation of one (1) full power UHF television transmitter and has land available for the construction of a building for this purpose if necessary.]

j) The offer to negotiate contained herein is only valid for the purpose of the aquisition of WHFT-TV and cannot be honored for the purpose of new construction except if the apparatus of WHFT is removed from the tower under the control of engineering studies made by TBC and Stainless, Inc.

Sincerely,

TAK BROADCASTING CORPORATION

James L. Sorensen
Tower Manager -- Chief Engineer

cc: Mr. Tak
Mr. Harris

ACCEPTED:

For Glendale Broadcasting Corporation

Witness:

Title

For TelSA, Inc.

Witness:

Title

ATTACHMENT 3

WHFT-TV Tower Lease

DECLARATION OF MICHAEL EVERETT

I, Michael Everett, make the following declaration under penalty of perjury:

1. I am the Assistant Secretary of Trinity Broadcasting of Florida, Inc. ("TBF"), licensee of Television Station WHFT-TV, Channel 45, Miami, Florida. I am also the Station Manager of WHFT-TV and am responsible for maintaining the station's lease for tower space..

2. WHFT-TV's antenna is located on what is known as the

000

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COPY

4. Lessor and Lessee now desire to clarify and restate paragraph 2 of Lease so that it clearly states that the term of the Lease is for a period of fifty years.

Agreement

NOW, THEREFORE, the parties agree as follows:

Paragraph 2 at page 2 of the Lease is hereby amended to state:

"2. TERM OF LEASE: The term of this Lease shall be for a period of fifty (50) years commencing with the beginning of the day of the date of this Lease and terminating at the end of the day preceding the month and day of this Lease but in the year 2023; provided, however, that the term of this Lease may be extended or shall be terminated as hereinafter provided in paragraph 3, below."

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals and caused this Lease to be duly executed.

Signed and sealed in
the presence of:

CANDELABRA, INC.

As to President

By



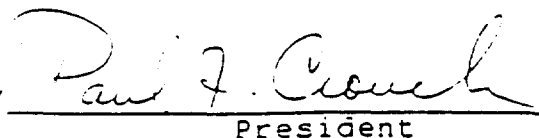
President

(Corporate Seal)

TRINITY BROADCASTING OF FLORIDA, INC.

As to President

By



President

(Corporate Seal)

STATE OF FLORIDA
COUNTY OF BROWARD

BEFORE ME, the undersigned authority, personally appeared

Joseph C. Limbano, as President of CANDELABRA, INC., a Florida corporation, to me personally known to be the individual described in and who executed the foregoing Amendment to Tower Space Lease and he acknowledged before me that he executed the same freely and voluntarily for the purposes set forth therein and on behalf of said Corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this __

21st day of October, 1985.

Carla E. Cameron
Notary Public

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. MAY 5, 1989
BONDED THRU GENERAL INS. UND.

STATE OF CALIFORNIA

COUNTY OF ORANGE

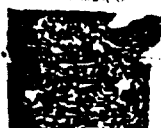
BEFORE ME, the undersigned authority, personally appeared

PAUL F. CROUCH, as President of TRINITY BROADCASTING OF FLORIDA, INC., a Florida corporation, to me personally known to be the individual described in and who executed the foregoing Amendment to Tower Space Lease and he acknowledged before me that he executed the same freely and voluntarily for the purposes set forth therein and on behalf of said Corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this __

13th day of February, 1985.

John W. [Signature]



(

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